Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

October Term, 2000

DAVID G. PFLUM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

David G. Pflum
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QUESTIONS PRESENTED

I. Whether the Tenth Circuit Court Of Appeals erred holding that under Rule 60(b)(3), Fed. R. Civ. P., Pflum must show the Government acted with an intent to deceive or defraud the court, by means of a deliberately planned and carefully executed scheme.

II. Whether the Tenth Circuit Panel overlooked the facts as to fraud.

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OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals denying David Pflum's Petition for Rehearing En Banc is not reported. The Order was filed May 18, 2001, and is styled *David Pflum v. United States of America*, Appeal No. 00-3242 (10th Circuit), and is reprinted in Appendix A.

The opinion of the Tenth Circuit Court of Appeals denying David Pflum's appeal is reported as *David Pflum v. United States of America*, 2001 U.S. App. LEXIS 4355; 87 A.F.T.R.2d (RIA) 1360 (Tenth Circuit, March 22, 2001), and is reprinted in Appendix B.

The opinion of the United States District Court denying David Pflum's Rule 60(b), Fed. R. Civ. Proc., motion is not reported. The Order was filed July 6, 2000, and is styled *Pflum v. United States of America*, Case No. 99-4093-SAC (District of Kansas), and is reprinted in Appendix C.

JURISDICTION

The opinion of the Tenth Circuit Court of Appeals in this case, denying David Pflum's petition for rehearing en banc, was filed on May 18, 2001. This petition is therefore timely under Supreme Court Rules 13.1, 13.3, 29.2, & 30.1 if mailed U.S.P.S. first class, postmarked by August 16, 2001.

This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves application of the following statutory provision.

Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., Sec. 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by

an independent action.

Rule 60(b), Fed. R. Civ. Proc.

STATEMENT OF THE CASE

IRS agent Lawrence Schmidt ("Schmidt") issued administrative summonses to St. Marys State Bank of St. Mary, Kansas; First National Bank–Clifton of Clifton, Kansas; and Kaw Valley State Bank & Trust of Wamego, Kansas, seeking financial information concerning Pflum for the tax years 1994-1998.

Pflum filed a petition to quash the summonses. The United States filed a motion for summary denial of the petition and for summary enforcement of the IRS summonses. Attached to the United States' motion was agent Schmidt's declaration that, *inter alia*, "the testimony, books, papers, records and other data sought by the summons . . . [were] not already in the possession of the IRS." Pflum opposed the United States' motion for summary judgment, and the United States replied.

The District Court granted summary judgment for the United States finding, *inter alia*, that the material sought by the summonses were not already in the IRS's possession.

On May 17, 2000, Pflum filed a motion to vacate based on newly discovered evidence that Special Agent Schmidt misrepresented to the District Court that the material sought by the summonses were not already in the possession of the IRS. Pflum also moved for leave to file supporting documents under seal.

The United States' response admitted that some summoned

materials were actually possessed by the IRS, but argued that the summonses should still be enforced in full. The District Court granted Pflum's motion to file the documents under seal, but denied the motion to vacate on the ground that Pflum had not proven a lack of good faith.

On Appeal, Pflum argued (1) that the judgment should be vacated because he was entitled to an evidentiary hearing to determine the extent of the IRS's possession of records it had summoned, (2) that proof of bad faith was unnecessary in light of proof of possession of documents summoned, and (3) that the summonses on remand should be limited to documents not in the IRS' possession. In reply to the United States' response that Pflum must show "an intent to deceive or defraud the court by means of a deliberately planned and carefully executed scheme" to prevail, Pflum argued that relief under Rule 60(b)(3) was not limited to the "fraud on the court" standard.

The Tenth Circuit Panel did not reach the merits on appeal, but, rather, denied relief on the ground that under Rule 60(b)(3) Pflum must show the government "acted with an intent to deceive or defraud the court, by means of a deliberately planned and carefully executed scheme."

Pflum filed a petition for rehearing with suggestion for rehearing en banc. Pflum argued that the Panel's decision conflicts with the decision of *Robinson v. Audi AG*, 56 F.3d 1259 (10th Cir. 1995), which, despite the misquotation by *Yapp v. Excel Corp.*, 186 F.3d 1222 (10th Cir. 1999), upon which the Panel relied, holds that merely a misrepresentation with an intent to deceive or defraud the court is sufficient grounds for relief even under a "fraud upon the court" analysis. Therefore, consideration by the full Court is necessary to secure and maintain uniformity of the Court's decisions.

The Tenth Circuit Panel's decision also conflicts with the decision of *Woodworker's Supply Inc. v. Principal Mutual Life Ins. Co.*, 170 F.3d 985 (10th Cir. 1999), which holds that relief may be granted under Rule 60(b)(3) merely upon proof that the challenged behavior substantially interfered with the aggrieved party's ability to fully and fairly prepare for and proceed at trial.

On May 18, 2001, the Tenth Circuit denied Pflum's petition for rehearing.

This timely petition follows.

REASON FOR GRANTING THE WRIT

I. The Tenth Circuit Court Of Appeals Erred Holding That Under Rule 60(b)(3) Pflum Must Show The Government Acted With An Intent To Deceive Or Defraud The Court, By Means Of A Deliberately Planned And Carefully Executed Scheme .

The instant proceeding involves a question of exceptional importance because the Tenth Circuit Panel's decision failed to distinguish the standard applied to the judicially created equitable remedy for "fraud upon the court," which it imposed, from the standard applied to "fraud . . ., misrepresentation, or other misconduct of an adverse party" under Rule 60(b)(3). The Tenth Circuit Panel's decision conflicts with the express language of Rule 60(b) and authoritative decisions of the First, Fifth, Seventh, and Eleventh Circuit Court of Appeals.

Pflum filed Freedom of Information Act ("FOIA") requests to obtain various documents from the Internal Revenue Service. On or about April 10, 2000, Pflum received documents responsive to his FOIA requests. The FOIA documents

included monthly and yearly spreadsheets obtained from the financial institutions summoned in this case. These documents were filed under seal with the district court. They included:

(1) A summary covering the years 1992 through 1997, which includes information from St. Marys State Bank, Kaw Valley, and First National Bank.

(2) A summary of deposits for the years 1991 through 1996, which includes St. Marys Bank and First National Bank.

(3) A summary of monthly deposits for the years 1991 through 1996 for St. Marys Bank.

(4) A summary of monthly deposits for the years 1991 through 1996 for St. Marys Bank.

(5) A summary of monthly deposits for the years 1993 through 1996.

Agent Schmidt admitted[1] that he had actual possession of summoned material when he issued the summonses.

Pflum argued that Special Agent Schmidt's proven misrepresentation that he did not possess the summoned documents, an essential element of the United States' *prima facie* showing and the basis of the District Court's summary

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1. This was in contradiction to his earlier declaration that summoned documents were not in the IRS's possession, and certainly contrary to the District Court's March 27, 2000, finding in reliance on that declaration.

judgment against Pflum, justified vacating the summary judgment and conducting an evidentiary hearing to determine the extent of summoned documents possessed by Agent Schmidt. The Court cited *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999), and held that "Mr. Pflum must prove the government's alleged misconduct by clear and convincing evidence, showing that the government 'acted with an intent to deceive or defraud the court, by means of a deliberately planned and carefully executed scheme." *Yapp* cited *Robinson v. Audi AG*, 56 F.3d 1259, 1267 (10th Cir. 1995) as authority.

A. The Tenth Circuit Panel's Decision Conflicts with the Case Relied upon by the Panel's Cited Authority: *Robinson v. Audi AG*, 56 F.3d 1259 (10th Cir. 1995).

The District Court in *Robinson* had cited *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), for the proposition that fraud must be "deliberately planned and carefully executed." *Robinson*, 56 F.3d at 1265. The Tenth Circuit, however, did not. The Court actually held that even under a "fraud on the court" analysis,[2] a misrepresentation with an intent to deceive or defraud the Court is sufficient. *Robinson*, 56 F.3d at 1267.[3]

Therefore, the one sentence devoted to the issue in *Yapp*

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2. Which is much more restrictive than a Rule 60(b)(3) standard, as will be discussed below.

3. Observing that the Sixth Circuit had held a "reckless disregard for the truth" to be sufficient in *Demjanjuk v. Petrovsky*, 10 F.3d 338, 353 (6th Cir. 1993). *Robinson*, 56 F.3d at 1266.

actually misstated the authority it was relying upon.

B. The Tenth Circuit Panel's Decision Conflicts with *Woodworker's Supply Inc. v. Principal Mutual Life Ins. Co.*, 170 F.3d 985 (10th Cir. 1999).

Relief under Rule 60(b)(3) is not limited merely to fraud, but also extends to "misrepresentation" and "other misconduct." As the Tenth Circuit has held, retrial may be "mandated under Rule 60(b)(3) [if] the challenged behavior [] substantially [] interfered with the aggrieved party's ability fully and fairly to prepare for and proceed at trial." *Woodworker's Supply Inc. v. Principal Mutual Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999).

Without doubt, the misrepresentation of an essential element of the United States' *prima facie* case, resulting in summary judgment against Pflum, aggrieved his ability to defend. Thus, relief should have been granted under Rule 60(b)(3).

C. The Tenth Circuit Panel's Decision Conflicts with Rule 60(b)(3) and Decisions of Other Courts of Appeals That Have Addressed the Issue.

Rule 60(b) provides that:

> Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not

have been discovered in time to move for a new trial under Rule 59(b); **(3) fraud** (whether heretofore denominated intrinsic or extrinsic)**, misrepresentation, or other misconduct of an adverse party**; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. **This rule does not limit the power of a court to** entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title *28, U.S.C., § 1655,* or to **set aside a judgment for *fraud upon the court.*** Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. (Emphasis added).

By its express terms, Rule 60(b) distinguishes four separate concepts. First, it distinguishes "fraud upon the court," under Rule 60(b), from the grounds for relief under Rule 60(b)(3). It also distinguishes "fraud," "misrepresentation," and "other misconduct," within Rule 60(b)(3). The Tenth Circuit Panel's failure to distinguish between the statutory terms rendered them superfluous in violation of the established principle of statutory

construction that all words within a statute are intended to have meaning and should not be construed as surplusage.

> Cases in other circuits clearly explain these distinctions.
>
> Because Mrs. Rozier's 60(b)(3) motion was timely filed, we have no occasion to review Ford's conduct in light of the more exacting "fraud upon the court" standard also provided for by Rule 60(b).

Rozier v. Ford Motor Co., 573 F.2d 1332, 1337-39 (5th Cir. 1978) (discussing at length the distinction between a "fraud upon the court" motion, judicially created by *Hazel-Atlas* prior to the 1946 revision of Rule 60, and a Rule 60(b)(3) motion.).

> Failure to disclose or produce materials requested in discovery can constitute "misconduct" within the purview of this subsection. "Misconduct" does not demand proof of nefarious intent or purpose as a prerequisite to redress. For the term to have meaning in the Rule 60(b)(3) context, it must differ from both "fraud" and "misrepresentation." Definition of this difference requires us to take an expansive view of "misconduct." The term can cover even accidental omissions – elsewise it would be pleonastic, because "fraud" and "misrepresentation" would likely subsume it. We think such a construction not overly harsh; it takes scant imagination to conjure up discovery responses which, though made in good faith, are so ineptly researched or lackadaisical that they deny the opposing party a fair trial. Accidents – at least avoidable ones – should not be immune from the reach of the rule. Thus, we find ourselves in agreement with the Fifth Circuit that, depending upon the

> circumstances, relief on the grounds of misconduct may be justified "whether there was evil, innocent or careless purpose." (Internal citations omitted).

Anderson v. Cryovac, Inc., 862 F.2d 910, 923 (1st Cir. 1988).

> Were the term "misrepresentation" as used in Rule 60(b)(3) interpreted to encompass only false statements made with the intention to deceive, the behavior described by that word would be wholly subsumed within the category of behavior that the same subsection of the rule refers to as "fraud." Such a narrow reading of the word would render it superfluous for purposes of Rule 60(b)(3).

United States v. One (1) Douglas a-26B Aircraft, 662 F.2d 1372, 1374 n.6 (11th Cir. 1981).

> Fed. R. Civ. P. 60(b)(3) applies to both intentional and unintentional misrepresentation.

Lonsdorf v. Seefeldt, 47 F.3d 893, 897 (7th Cir. 1995).

Therefore, it is plain that the Court misapplied the principles of the judicially created "fraud upon the court" rule to Pflum's motion under Rule 60(b)(3).

The damage resulting from the misapplication of the law is even more grievous because, to obtain relief, Pflum was not required to prove the results of the case would change.

> A determination of whether the alleged misrepresentation altered the result of the case is unnecessary because Rule 60(b)(3) protects the fairness

> of the proceedings, not necessarily the correctness of the verdict.

Lonsdorf, 47 F.3d at 897.

> Rule 60(b)(3) . . . does not require that the information withheld be of such nature to alter the results in the case. This subsection of the Rule is aimed at judgments which were unfairly obtained, not at those which were factually incorrect. (Internal citations omitted).

Rozier, 573 F.2d at 1339.

> Another well-sculpted marker points out that misconduct need not be result-altering in order to merit Rule 60(b)(3) redress. See *Wilson v. Thompson*, 638 F.2d 801, 804 (5th Cir. 1981); *Rozier*, 573 F.2d at 1339; *Seaboldt v. Pennsylvania Railroad Company*, 290 F.2d 296, 299 (3rd Cir. 1961); see also *Bunch v. United States*, 680 F.2d 1271, 1283 (9th Cir. 1982) (when information withheld in discovery, aggrieved party need not establish that outcome would have been different).

Anderson, 862 F.2d at 923-24.

The Tenth Circuit Court of Appeals cited *Anderson* as authority that retrial is mandated under Rule 60(b)(3) if the challenged behavior substantially interfered with the aggrieved party's ability to fully and fairly prepare for and proceed to trial, *Woodworker's*, 170 F.3d at 993, without placing any condition that the result be altered.

II. The Tenth Circuit Panel Overlooked The Facts As To Fraud.

In discussing its factual analysis, the Tenth Circuit Panel said:

> Mr. Pflum has alleged only that the government had some documents sought in the summons. He has offered no evidence beyond his conclusory statement that the investigating officer actually examined the one packet of documents rather than resealing them and handing them over for safekeeping as he attested.
>
> This statement misstates Pflum's argument.

Pflum specifically abandoned on appeal his earlier argument relating to agent Schmidt's examination of the documents spoken of by the court:

> Pflum "accepted the facts as set forth in Special Agent Schmidt's [first] declaration." (U.S. Brief at 7). Once Schmidt's second declaration disclosed that he did not review the documents prematurely received from a summoned bank, Pflum abandoned his argument based on such review, and did not raise it before this Court. (U.S. Brief at 9 & 18). The challenge here is for an evidentiary hearing based upon evidence indicating that Schmidt's evaluation that he possessed only a "small portion of the summoned material" was self-serving at best.

(Appellant's Reply Brief at 4, fn.1).

Yet, Pflum specifically argued that fraud was proven by the

facts:

> The United States asserted that "there was no intentional misrepresentation with respect to the documents possessed by the Government at the time the summonses were issued." (U.S. Brief at 18-19). This is simply incredible. Even though Pflum need not prove fraud to prevail, fraud is clear in the record.
>
> The United States admitted that IRS Special Agent Schmidt ("Schmidt") executed a "sworn declaration" that the summoned material was not already in the possession of the IRS, and that the declaration "established a prima facie case for enforcement of the summonses." (U.S. Brief at 6). The United States admits that the district court entered judgment based upon the declaration. (U.S. Brief at 6-8). The United States admits that, after Pflum filed a Rule 60(b) motion, Schmidt executed a second declaration that admitted he had in his "possession," at the time he issued the summonses, material that fell "within some of the categories of documents listed in the summonses." (U.S. Brief at 8-9).
>
> The record on appeal clearly discloses that Schmidt prepared summonses based upon his review of the documents to compel, *inter alia*, production of the very same documents, and swore he did not possess those documents in order to persuade the district court to order those documents produced. He did not tell the district court, or Pflum, that he possessed some of the documents being summoned. Therefore, the district court and Pflum were denied the ability to apply the law

> to the correct facts. Only after the misrepresentation was proven, by Pflum obtaining documents with his Freedom of Information Act request, did Schmidt execute another declaration admitting he had the documents. It seems the United States would have an easier road obtaining a perjury conviction than persuading this honorable Court that no intentional misrepresentation has taken place.
>
> Adding insult to injury, Schmidt's second declaration describes the records as "only a small portion of the summoned materials [which] were incomplete in multiple respects" (U.S. Brief at 10) even though the records consisted of detailed loan documents for 80% of the relevant tax years, and bank account statements for 60% (Docs. 9 & 13). Apparently, the declaration was a *post hoc* rationalization written in an attempt to come within an exception to the *Powell* requirements.
>
> However, as argued in Pflum's opening brief, that exception does not apply to the standard to obtain an evidentiary hearing. What documents are possessed and whether the documents possessed are a small or large part of the documents summoned are fact questions to be resolved at the hearing. Under the facts and the law of this Court, an evidentiary hearing is mandated.

(Appellant's Reply Brief at 2-4)

Because the Tenth Circuit Panel stated that Pflum offered no evidence, except that which was specifically abandoned on appeal, and did not discuss the evidence Pflum did argue on

appeal, Pflum believes the Tenth Circuit Panel overlooked these facts.

Because the Tenth Circuit Court of Appeals failed to properly apply long and well settled statutory analysis of this Court, a writ of *certiorari* should issue to correct the judgment.

CONCLUSION

For each and all of the above grounds, a writ of certiorari should issue.

The decisions below should be reversed.

Respectfully submitted,

DAVID G. PFLUM
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St. Marys, Kansas 66536
Telephone: (785) 437-2025

August 14, 2001.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID PFLUM,

Plaintiff - Appellant,

v. No. 00-3242

UNITED STATES OF AMERICA,

Defendant - Appellee.

ORDER

Filed May 18, 2001

Before SEYMOUR, BALDOCK, and LUCERO, Circuit Judges

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

By: M. Talamas
Deputy Clerk

APPENDIX B

DAVID PFLUM, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee.

No. 00-3242

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

2001 U.S. App. LEXIS 4355; 87 A.F.T.R.2d (RIA) 1360; 2001 Colo. J. C.A.R. 1558

March 22, 2001, Filed

NOTICE:

RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY:

Reported in Table Case Format at: 2001 U.S. App. LEXIS 10381.

PRIOR HISTORY:

(D. Kan.). (D.C. No. 99-CV-4093-SAC).

DISPOSITION:

AFFIRMED for substantially the reasons stated by the court in its order of July 6, 2000.

COUNSEL:

For DAVID PFLUM, Plaintiff - Appellant: David Pflum, Saint Mary's, KS.

For UNITED STATES OF AMERICA, Defendant - Appellee: Richard Farber, Karen D. Utiger, United States Department of Justice, Tax Division, Washington, DC.

Steven D. Silverman, U. S. Department of Justice, Office of Special Litigation - Tax Div. Washington, DC.

JUDGES:

Before SEYMOUR, BALDOCK, and LUCERO, Circuit Judges.

OPINION BY:

Bobby R. Baldock

OPINION:

ORDER AND JUDGMENT *

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not

materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff David Pflum, proceeding pro se, appeals from an order of the district court denying his motion, filed pursuant to Fed. R. Civ. P. 60(b), to vacate its judgment in this case. We affirm.

Mr. Pflum filed a petition in federal district court seeking to quash summonses issued by the Internal Revenue Service to three financial institutions seeking information in their possession concerning the years 1994 to 1998. He asserted that he had not been served with proper notice of the summonses. The district court denied the petition. Almost two months later, Mr. Pflum filed a Rule 60(b) motion seeking vacation of the district court's order on the ground that the government already possessed some of the records it sought in the summonses and had received and examined some of the summoned documents before the court issued its order denying his petition. The district court denied relief holding that even if the government had possessed some of the records, Mr. Pflum could not prevail as he had not shown a lack of good faith in the government's actions. See Rule 60(b)(3).

On appeal, Mr. Pflum contends that he does not have to show a lack of good faith, only that the government already possessed some of the records it sought in the summonses. We review the district court's ruling on a Rule 60(b) motion for abuse of discretion. *Servants of the Paraclete v. Doe, I-XVI, 204 F.3d 1005, 1009 (10th Cir. 2000).* "Relief under Rule 60(b) ... is extraordinary and may only be granted in exceptional circumstances." *Yapp v Excel Corp., 186 F.3d 1222, 1231 (10th Cir. 1999)* (quotation omitted). Under Rule 60(b)(3), Mr. Pflum

must prove the government's alleged misconduct by clear and convincing evidence, showing that the government "acted with an intent to deceive or defraud the court, by means of a deliberately planned and carefully executed scheme." Id. (quotations omitted). Mr. Pflum has alleged only that the government had some of the documents sought in the summonses. He has offered no evidence beyond his conclusory statement that the investigating officer actually examined the one packet of documents rather than resealing them and handing them over for safekeeping as he attested. Mr. Pflum "has not ... shown that the district court made a clear and definite error in concluding that [the government]'s behavior did not rise to the level of Rule 60(b)(3) misconduct." Id.

Finding no abuse of discretion, the judgment of the United States District Court for the District of Kansas is AFFIRMED for substantially the reasons stated by the court in its order of July 6, 2000.

Entered for the Court

Bobby R. Baldock

Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

DAVID G. PFLUM,

Petitioner,

-vs- No. 99-4093-SAC

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM AND ORDER

The case comes before the court on the petitioner's *ex parte* motion for leave to file documents under seal (Dk. 8) and on the petitioner's motion to alter, amend or vacate judgment (Dk. 9). The respondent filed its brief in opposition to both motions. (Dk. 10). After reviewing the matters submitted and researching the relevant law, the court grants with certain conditions the motion for leave to file under seal the documents and denies the motion to alter, amend or vacate judgment.

PROCEDURAL BACKGROUND

David G. Pflum ("Pflum") filed his petition seeking to quash service of third party IRS summonses on St. Marys State Bank of St. Mary, Kansas; First National Bank – Clifton of Clifton, Kansas; and Kaw Valley State Bank & Trust of Wamego, Kansas. The government filed its motion seeking summary relief arguing that its memorandum presented a prima facie case for enforcing the summonses and that Pflum was without a valid defense to enforcement. In support of its

motion, the government attached the declaration of Laurence Schmidt, a special agent employed by the Internal Revenue Service ("IRS"), Criminal Investigation Division in Topeka, Kansas. Because Pflum accepted the facts as stated in the agent's declaration, the court treated those same facts as uncontested.

The court found that the government made its prima facie showing based on the Special Agent Schmidt's declaration. In relevant part, Schmidt declared that "[t]he testimony, books, papers, records and other data sought by the summonses ... are not already in the possession of the IRS." (Dk. 3, Ex. 1, para. 9). The court further found that Pflum did not carry his heavy burden of showing that the enforcement of the summonses would constitute an abuse of the court's process. Indeed, Pflum's only arguments had been squarely addressed and rejected by the Tenth Circuit in the decision of *Codner v. United States*, 17 F.3d 1331, 1333-34 (10th Cir. 1994). The court, therefore, granted the respondent's motion for summary denial of the petition to quash summonses and summary enforcement of the IRS summonses.

RULE 60(B) MOTION, DECLARATION, AND RESPONSE

Pflum moves the court to vacate its prior order enforcing the IRS summonses. He contends the respondent misrepresented the facts that it did not already possess the information requested by its summonses and that it had no already received and examined the summoned documents prior to the court's order. To support these allegations, Pflum attaches his own declaration under penalty of perjury.

Pflum declares that in response to a Freedom of Information Act ("FOIA") request to the IRS, he received

certain documents. One document was a memorandum of activity signed by Special Agent Schmidt stating that on March 29, 1999, he received and opened an envelope without removing its contents from one of the banks which was served with a summons. Recognizing a form for payment of summons expense, Schmidt telephone the bank and learned that the envelope did contain records in response to the summons. Schmidt resealed the envelope and turned its possession over to another special agent. Other documents obtained in the FOIA request are what Pflum represents to be monthly and yearly spread sheets obtained from the financial institutions summoned in this case. He submits copies of these records in a sealed envelope attached to his motion for leave to file under seal.

Pflum contends these documents establish that Special Agent Schmidt misrepresented to the court that the IRS did not already possess the documents requested in the summonses. He argues the case law requires the IRS to inform the court which of the documents requested by the summonses it already possesses. He finally asserts that Special Agent Schmidt illegally examined the summoned documents and that the court should sanction the IRS for this conduct.

In response, the government submits another declaration from Special Agent Schmidt, which states in relevant part:

> 4. I received on March 29, 1999 a business-sized envelope from First National Bank – Clifton. It was unclear to me whether the envelope contained materials that I had summoned. I therefore opened the envelope and, without removing the contents, saw an IRS Form 6863 (Invoice and Authorization for Payment of Administrative Expenses). I then contacted the bank

and was informed that the envelope contained materials listed in the summons. I immediately resealed the envelope and placed it in the care of another Special Agent who was uninvolved in this case. The Special Agent locked the envelope in a location to which I had no access. At the bank's request, I returned the envelope on March 31, 1999.

....

6. At the time that I issued the summonses, there was in my possession certain papers that the banks had provided to the IRS's Topeka Collections Branch. While these materials fell within some of the categories of documents listed in the summonses, they represented only a small portion of the summoned materials and were incomplete in multiple respects. For example:

> a. The summonses sought documents for the years 1994 through 1998, but the materials previously provided covered a period ending one to two years earlier;
>
> b. The banks had produced several financial statements associated with loan files, but appeared not to have produced the loan files in their entirety; and
>
> c. The banks had produced some bank statements, but had not produced corresponding checks, deposit tickets, and deposit items, all of which are essential to a criminal tax fraud investigation.

7. I issued the summonses in order to fill in the gaps in the materials described, as well as to obtain additional

information critical to my investigation.

(Dk. 10, Ex. A). As established by Schmidt's declaration, the government denies that it improperly summoned materials already in its possession or that summoned materials were illegally reviewed.

RULE 60(B) STANDARDS

Rule 60 of the Federal Rules of Civil Procedure has been called the "grand reservoir of equitable power to do justice in a particular case." *F.D.I.C. v. United Pacific Ins. Co.*, 152 F.3d 1266, 1272 (10th Cir. 1998) (quotation omitted). Accordingly, the district court retains substantial discretion "to grant relief as justice requires under Rule 60(b), yet such relief is extraordinary and may only be granted in exceptional circumstances." *Servants of Paraclete v. Does*, 204 F.3d 1005, 1009 (10th Cir. 2000). "A litigant shows exceptional circumstances by satisfying one or more of Rule 60(b)'s six grounds." *Van Skiver v. United States*, 952 F.2d 1241, 1243-44 (10th Cir. 1991), *cert. denied*, 506 U.S. 828 (1992).

Rule 60(b)(3) provides that a district court may vacate a judgment for "fraud ..., misrepresentation, or other misconduct of an adverse party." To prevail on this ground, the movant must prove with clear and convincing evidence that an adverse party "engaged in a fraud or misrepresentation that prevented the movant from fully and fairly presenting its case." *Atkinson v. Prudential Property Co., Inc.*, 43 F.3d 367, 373 (8th Cir. 1994) (citation omitted); see *Anderson v. Department of Health & Human Services*, 907 F.2d 936, 952 (10th Cir. 1990).

LAW AND ANALYSIS

To enforce an administrative summons, the government has the initial burden of showing good faith in the issuance of the summons by proving that (1) the investigation will be conducted for a legitimate purpose; (2) the inquiry is relevant to that purpose; (3) the material sought is not already within the government's possession; (4) the administrative steps required by the Internal Revenue Code and applicable regulations have been followed; and (5) no criminal referral regarding the taxpayer's case has been made to the Department of Justice. *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 318 (1978); *United States v. Powell*, 379 U.S. 48, 57-58 (1964). The government's burden is slight; an affidavit from the IRS agent issuing the summons is generally sufficient to meet that burden. *United States v. Balanced Financial Management, Inc.*, 769 F.2d 1440, 1443 (10th Cir. 1985). Once the government makes this prima facie showing, the potential taxpayer bears a "heavy" burden of factually refuting the government's case or demonstrating an affirmative defense such as a lack of good faith. *Id.* at 144. "'The taxpayer must do more than just produce evidence that would call into question the Government's prima facie case. The burden of proof in these contested areas rests squarely on the taxpayer.'" *Id.* (quoting *United States v. Kis*, 658 F.2d 526, 538-39 (7th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982)).

Had Pflum presented earlier the fact that the IRS already possessed some of the records sought by the summonses and argued that the third criterion in *Powell* was not established, he still would not have prevailed in proving the government's lack of good faith. "The Supreme Court clearly held in *Powell*, that the showing of abuse of process necessary to quash an administrative summons must be 'predicated on more than the

fact of re-examination.'" *United States v. Insurance Consultants of Knox, Inc.*, 187 F.3d 755, 760 (7th Cir. 1999) (quoting *Powell*, 379 U.S. at 51), *cert. denied*, 120 S. Ct. 802 (2000); see *United States v. Kerrigan*, 114 F.3d 1170, 1997 WL 222249, at *1 (1st Cir. Apr. 28, 1997) (Table) ("Nor do we think the fact that the revenue agent admitted to having bank records shows bad faith.").

Courts have rejected "a literal interpretation of this *Powell* criterion in favor of a practical approach to IRS accessibility." *United States v. John G. Mutschler & Assoc., Inc.*, 734 F.2d 363, 367-68 (8th Cir. 1984) (citing decisions from the Seventh, fifth and Third Circuits). In other words, the "'already possessed' exception to the enforcement of IRS summonses has been narrowly construed." *United States v. Texas Heart Institute*, 755 F.2d 469, 476 (5th Cir. 1985), *overruled on other grounds*, *United States v. Barrett*, 837 F.2d 1341 (5th Cir. 1988), *cert. denied*, 492 U.S. 926 (1989); see also *United States v. Moseley*, 832 F. Supp. 56, 61 (W.D.N.Y. 1993). It has been read "as a gloss on Section 7605(b)'s prohibition of 'unnecessary' summonses, rather than an absolute prohibition against the enforcement of any summons to the extent that it requests the production of information already in the possession of the IRS." *United States v. Davis*, 636 F.2d 1028, 1037 (5th Cir.), *cert. denied*, 454 U.S. 862 (1981); *United States v. Texas Heart Institute*, 755 F.2d at 476. Indeed, courts have viewed this requirement to be "that the taxpayer must show that the Government actually possesses the information summonsed, such that enforcement of a summons is 'unnecessary' as that term is used in Section 7605(b)." *United States v. Texas Heart Institute*, 755 F.2d at 476; see also *Phillips v. United States*, 178 F.3d 1295, 1999 WL 228585, at *3 (6th Cir. Mar. 10, 1999) (Table); *United States v. Davis*, 636 F.2d at 1038; *Knauss v. United States*, 28 F. Supp. 2d 1252,

1254 (S.D. Fla. 1998); *cf. United States v. Balanced Financial Management*, 769 F.2d at 1446-47.

Several examples show how the courts have used a practical interpretation and application of this criterion. "[D]ocuments which are in the physical possession of the IRS but 'incapable of practical retrieval' are deemed to not be 'already possessed' for purposes of the *Powell* test." *United States v. Moseley*, 832 F. Supp. At 61 (citing *United States v. Linsteadt*, 724 F.2d 480, 483-84 (5th Cir. 1984)). The government is not deemed to already possess documents for purposes of a tax fraud audit when those same documents were initially inspected by the IRS in a routine audit. *United States v. Silvestain*, 668 F.2d 1161, 1163 (10th Cir. 1982); see e.g., *Spell v. United States*, 907 F.2d 36, 38 (4th Cir. 1990); *United States v. Texas Heart Institute*, 755 F.2d at 477. The last example is directly relevant here:

> When a summons as a whole is not harassing, when the bulk of the materials summoned is not demonstrably in the possession of the IRS, and where the marginal burden of supplying information which might already be in the possession of the IRS is small, ..., enforcement of the summons in its entirety is not an 'unnecessary examination or inspection' within the meaning of Section 7605(b).

United States v. Davis, 636 F.2d at 1038; see also *United States v. Moseley*, 832 F. Supp. at 61; *United States v. Pentelute*, 568 F. Supp. 76, 80 (D. Utah 1983).

Pflum makes no showing that the Government actually possesses the information summonsed, such that the enforcement of the summonses is 'unnecessary' as that term is

used in Section 7605(b). There is no evidence that the summonses here are harassing as a whole. Agent Schmidt's declaration demonstrates that the bulk of the materials summoned are not in the IRS's possession. The burden on the banks to produce those documents that may already be in the IRS's possession appears to be marginal and so inconsequential as to dispense with requiring the IRS to identify those documents and with limiting the enforcement of the summonses. Moreover, the limited documents already in the IRS's possession were gathered for the purpose of collection and now they, as well as their supporting documentation, are needed for a different purpose, that is, to investigate tax fraud. The court denies any Rule 60(b) relief based on the evidence that the IRS may already possess some of the documents being summoned.

Pflum offers no evidence to substantiate his allegation that Special Agent Schmidt examined an envelope containing documents responsive to a summons. The record is uncontroverted that Schmidt opened the envelope and upon recognizing a payment form resealed the envelope without examining the contents of the envelope. Consequently, there is no basis for any finding that the IRS examined any of the summoned records in violation of 26 U.S.C. Section 7609(d). In conclusion, the court finds that Pflum is not entitled to any of the relief requested in his Rule 60(b) motion.

MOTION FOR LEAVE TO FILE DOCUMENTS UNDER SEAL

Accepting Pflum's representation that the attached documents are sensitive financial documents, the court grants him leave to file them under seal for purposes of only this particular case. The court conditions leave upon Pflum

promptly providing the government with a copy of these documents.

IT IS THEREFORE ORDERED that petitioner's *ex parte* motion for leave to file documents under seal (Dk. 8) is granted for purposes of only this particular case, on the condition that Pflum promptly provide the government with a copy of these documents;

IT IS FURTHER ORDERED that petitioner's motion to alter, amend or vacate judgment (Dk. 9) is denied.

Dated this 6th Day of July, 2000, Topeka, Kansas.

Sam A. Crow, U.S. District Senior Judge